MOTION FILED
OCT 8 - 1982

Nos. 82-354, 82-355 and 82-398

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *ET AL.*
and
CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION
and
UNITED STATES DEPARTMENT OF TRANSPORTATION, *ET AL.*,
*Petitioners*,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *ET AL.*,
and
NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, *ET AL.*,
*Respondents*.

## MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE ON BEHALF OF THE AUTOMOTIVE OCCUPANT PROTECTION ASSOCIATION IN OPPOSITION TO THE PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

*Of Counsel:*
THOMAS C. MCGRATH, JR.
110 South Kenyon Avenue
Margate City, New Jersey 08402
(609) 823-1511

PHILIP R. COLLINS*
1026 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 347-8899
**Counsel of Record*

October 8, 1982

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## MOTION OF THE AUTOMOTIVE OCCUPANT PROTECTION ASSOCIATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

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Pursuant to Rule 36 of the Rules of this Court, the Automotive Occupant Protection Association hereby moves for leave to file the attached brief *amicus curiae* in support of Respondents. In support of this motion, the Automotive Occupant Protection Association states:

1. The movant is a trade association representing manufacturers of passive automotive occupant protection systems or their component parts and assemblies. In its endeavor to pro-

mote the reduction of injuries and deaths from automobile accidents, it compiles and disseminates scientific data and reliable information about the value and capability of passive restraint systems, and proposes, studies and evaluates design and performance standards for passive motor vehicle occupant protection systems developed by its members, automobile manufacturers, independent testing groups, etc. It keeps abreast of the state of the art in passive automotive occupant protection systems.

2. Because of the interest of the Automotive Occupant Protection Association and its members in motor vehicle safety and the need of passive automotive occupant protection systems to insure motor vehicle safety, it participated in the proceedings before the National Highway Transportation Safety Administration, an agency of the Petitioner, the United States Department of Transportation, involving Federal Motor Vehicle Standard Number 208, Occupant Crash Protection (National Highway Transportation Safety Administration Docket Number 74-14, Notice Number 25), which was the subject of the Order, which was rescinded by the United States Court of Appeals for the District of Columbia Circuit in its Opinions and Orders respectively of June 1, 1982 and August 4, 1982 (Pet. App. 1a-82a). The agency Decision [issued October 23, 1981, 46 Fed. Reg. 53419; Pet. App. 88a-129a] directly and immediately affected this Association and its members manufacturing passive automotive occupant protection systems or their component parts and assemblies. The Association and its members, in support of the position of the Respondents herein (Petitioners in the Court of Appeals), urged rescission of the Order of the agency in the United States Court of Appeals for the District of Columbia Circuit as *amicus curiae* by leave of that appellate court, and in its brief furnished the Court, *inter alia*, with the benefit of the technical expertise of its members concerning the state of the art of air bags as a passive automotive occupant protection system.

3. The Association represents to the Court, pursuant to the provisions of Rule 36 of the Rules of this Court, that it has

followed the Court Rules in the preparation of this Motion and has attached hereto its brief as *amicus curiae* in opposition to the petitions for certiorari of the Petitioners herein.

For these reasons the Association requests the permission of the Court to file the attached brief which sets forth more fully its views in opposition to the petitions for certiorari.

Respectfully submitted,

*Of Counsel:*
THOMAS C. MCGRATH, JR.
110 South Kenyon Avenue
Margate City, New Jersey 08402
(609) 823-1511

PHILIP R. COLLINS
1026 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 347-8899
*Counsel for Amicus Curiae Automotive Occupant Protection Association*

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**BRIEF AMICUS CURIAE OF THE AUTOMOTIVE OCCUPANT PROTECTION ASSOCIATION IN OPPOSITION TO THE PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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This brief is filed on behalf of the Automotive Occupant Protective Association contingent upon the Court's granting the Motion for Leave to File a Brief *Amicus Curiae* to which this brief is attached.

## OPINIONS BELOW

The June 1, 1982 opinion of the Court of Appeals (Pet. App. 1a-78a)[1] is reported at 680 F.2d 207. The August 4, 1982 supplemental order and memorandum of the Court of Appeals (Pet. App. 79a-82a) are not reported. The decision of the Administrator of the National Highway Traffic Safety Administration rescinding the passive restraint requirements of Federal Motor Vehicle Safety Standard 208 (Pet. App. 88a-129a) is published at 46 Fed. Reg. 53419.

## JURISDICTION

The petition of the Petitioner, United States Department of Transportation, sets forth the bases for jurisdiction of the United States Court of Appeals and this Court. On September 14, 1982, this Court issued an order extending time for filing responses to the petitions by the Respondents to no later than October 8, 1982, thirty days after the filing of the last petition in this matter. Since the Automotive Occupant Protection Association, the movant for leave to file this brief *amicus curiae*, supports the positions of the Respondents in opposition to the petitions for certiorari, it is timely filing this Motion and Brief Amicus Curiae, pursuant to the aforesaid permission for responses in opposition granted to the Respondents.

## STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Administrative Procedure Act, 5 U.S.C. § 706 and of the National Traffic and Motor Vehicle Safety Act of 1966, Title I, as amended, 15 U.S.C. §§ 1331 et seq. are reproduced in the Petitioner's Appendices to Petition for Certiorari, Appendix I, pp. 162a-171a.

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari filed in Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Company, No. 82-354, which seeks review of the decision and supplemental order of the Court of Appeals in this case.

## STATEMENT OF INTEREST

The interest of the Automotive Occupant Protection Association is set forth in its Motion for Leave to File a Brief Amicus Curiae. The Automotive Occupant Protection Association refers this Court to the motion.

## STATEMENT

This *amicus* adopts the Statement to be found in the Brief of Respondents, National Association of Independent Insurers, et al., but incorporates by reference herein as important background information the statement of the case and the passive restraint history to that date (*circa* 1978-1979) as found in the opinion of the United States Court of Appeals for the District of Columbia Circuit in *Pacific Legal Foundation* v. *Department of Transportation, et al.*, 593 F.2d 1338, 1340-1343 (D.C. Cir. 1979), cert. den., 444 U.S. 830 (1979).

## REASONS FOR DENYING THE PETITION

The several Petitioners have proffered a variety of reasons why this Court should grant a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit. The respective Respondents will undoubtedly respond to these multifarious and alleged reasons point by point. This *amicus* shall, on the other hand, respond to selective reasons and arguments raised principally in the petitions of the United States Department of Transportation and the Motor Vehicle Manufacturers Association of the United States.

1. In the first two Questions Presented by the United States Department of Transportation, reliance is placed on "changed circumstances" as the keystone for the National Highway Transportation Safety Administration's (hereinafter referred to as NHTSA or NHTSA's) rescission of the passive restraint requirements of Federal Motor Vehicle Safety Standard 208. This *amicus* submits that in the main the changed circumstances consist of (a) the refusal of the automobile manufacturers to meet the "air bag" standard by in-

stalling automatic air bags; (b) the acceptance by NHTSA of the announced intentions of the industry being regulated to install a safety device (an easily detachable seat belt) which openly and defiantly thwarts the agency's safety rule and (c) the circumstance, ancillary to the safety issue, that the automobile industry is in economic doldrums.

If "changed circumstances" of this nature allow an administrative agency to reverse course 180 degrees on a safety issue most paramount to the American people, then there would appear to be no limit to administrative backing and filling to accommodate the wishes of the industry being regulated. This seems especially true where the original course set by NHTSA was not only upheld by the courts but withstood congressional assault.

2. The concern is raised by the Petitioner that "the decision below will serve as precedent in the District of Columbia Circuit, where the vast majority of petitions for review of administrative decisions are filed," substantially impeding "the ability of the agencies to revise their existing policies" and "chilling the agencies in their development of new policies for fear of judicial obstacles to subsequent modification." *Petition of the Motor Vehicle Manufacturers Association of the United States*, p. 16. This petition endeavors to have the court view the decision as having far-reaching effect on all future rulemaking petitions for review in the District of Columbia Circuit in line with this Court's opinion in *Vermont Yankee Nuclear Power*, where this Court was concerned with (and granted certiorari because of) the "additional procedural requirements" which the Court of Appeals proposed therein to "impose . . . on agency action." *Vermont Yankee Nuclear Power* v. *NRDC*, 435 U.S. 519, 535-537, n.14 (1978). To the contrary, here the Court of Appeals was not dealing with procedure or additional procedural requirements but with a substantive matter, the Federal Motor Vehicle Safety Standard 208. This Court of Appeals was uniquely cognizant of this standard, since it had previously upheld it in a very thorough opinion in

*Pacific Legal Foundation* v. *Department of Transportation, et al.*, 593 F.2d 1338, 1340-1343 (D.C. Cir. 1979), cert. den., 444 U.S. 830 (1979).

The decision of the Court of Appeals in the present case was only reached after a thorough and careful consideration of all the relevant factors and after a searching and careful inquiry, which led to the conclusion that there was a clear error of judgment on the part of the agency in placing the interests of the automobile industry over the safety of the American motorist. There was clear support in the court's opinion for the conclusion that the choice of the agency was arbitrary, capricious, an abuse of discretion and not in accordance with law. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971).

Again, this Court has well said that the responsibility of assessing a record to determine whether the position taken by an agency is correct "is not ours" but "*primarily* that of the Court of Appeals." This Court further stated that "it will intervene only in what ought to be the *rare instance* where the standard appears to have been *misapprehended or grossly misapplied.*" *Mobil Oil Corporation* v. *Federal Power Commission*, 417 U.S. 283, 310 (1974). *(Emphasis supplied.)* This situation does not here exist and we respectfully suggest that this matter be left to the Court of Appeals.

3. Though "to some FMVSS [Federal Motor Vehicle Safety Standard] 208 was always intended to be an air bag standard" (Pet. App. 63a) and it was suggested that the standard should "more descriptively [be called] the air-bag standard" *(Ibid.)*, the agency did not consider airbags in its analysis supporting rescission. As the Court of Appeals indicated, the agency did not deal with airbags as an obvious alternative in its analysis because "domestic manufacturers have decided to use" easily detachable seat belts rather than airbags to comply with the standard. The agency also indicated that "although benefits would be greater if [larger cars were equipped with airbags] it does not appear that this will happen." *Idem.*

In this Wilsonian-like approach,[2] the agency has placed the financial health of the domestic automobile industry over the safety of the American motorist. To it and its supporters, the phrase, *salus populi est suprema lex*, has little meaning, other than the mouthing of an ancient Roman. Such an arbitrary and capricious approach, alone, would require, or perhaps demand, that this Court of Appeals, steeped in the history of this Standard 208 from previous litigation on its docket, exercise its necessarily narrow jurisdiction as a reviewing court and rescind the action of the agency. See *Pacific Legal Foundation* v. *Department of Transportation, et al., supra.*

The clear and palpable turnabout by the agency after years of endeavoring to secure the safety of the driver and the car passengers by passive restraints represents an abnegation of responsibility by the agency, requiring the reviewing court to halt the arbitrary and capricious activities of the agency, as the latter completely ignored the intent of the safety statute.

The Petitioners here both urge that the Court of Appeals' approach as to alternatives, including airbags, was inconsistent with this Court's decision in *Vermont Yankee Nuclear Power Corporation, supra.* There is, however, a clear distinction between the action of the Court of Appeals in this case and this Court's teaching in *Vermont Yankee Nuclear Power Corporation.* This Court granted certiorari in the latter case, as we have previously shown, because questions of "significance" were raised by the Court of Appeals' view there that it could "impose additional *procedural requirements* on agency action. . . ." *Ibid.*, at page 537, fn. 14. *(Emphasis supplied.)* It is interesting to note that in endeavoring to stretch *Vermont Yankee Nuclear Power* to meet the facts of this case the Department of Transportation states that the Court of Appeals herein "should not have mandated a different *proce-*

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[2] Charles E. Wilson, sometime Secretary of Defense: "What's good for General Motors is good for the country!"

*dure* by insisting that the alternative it preferred be considered as a condition precedent to rescission . . ." *Petition of Department of Transportation*, p. 26.

As we have previously indicated, the fact of the matter is that the Court of Appeals herein was talking of a substantive matter, a standard, and had nothing to do with "additions to procedure" to obtain "a more adequate record," which the Court of Appeals had apparently sought in *Vermont Yankee Nuclear Power. Supra*, at p. 547. In a word, *Vermont Yankee Nuclear Power* has no applicability to the suggestion in this case by the Court of Appeals that the agency consider alternatives, including airbags.

4. The Petitioner, United States Department of Transportation, argues, as one of its main reasons for the granting of its petition that the Court of Appeals "exceeded the proper limits on judicial review" and/or "impermissibly preempted the agency's primary jurisdiction to make the further determination required by the Court's opinion," when on August 4, 1982 it ordered that "the compliance date of Federal Motor Vehicle Safety Standard 208, the passive restraint standard, are stayed until September 1, 1983 . . ." with the agency having the right to advise the Court by October 1, 1982 "whether such a compliance date is achievable, or whether a longer period is required, setting forth adequate reasons therefor." *Brief of Petitioner, United States Department of Transportation*, Question 3, p. (I) and pp. 26-28.

Both petitioners quote in some detail from the Court of Appeals' opinion of June 1, 1982 to show that the Court stated to the agency, *inter alia*, that (a) its decision does not foreclose rescission; (b) its remand to the agency was for the resolution of certain questions raised in the opinion and (c) that the agency recommend a timetable to the Court for agency analysis of the issues raised in the Court's Opinion.

There is not highlighted to this Court by the Petitioners, however, the concern of the Court of Appeals about foot-dragging on the agency's part when the matter was remanded

to it. In the same and successive paragraphs, in which is found the oft-quoted phrase, "our decision does not foreclose rescission," there also appear two stern warnings to the agency from the Court of Appeals: Firstly, the agency is warned that "[a]t the same time we should not simply remand this petition to the agency so that recalcitrance might succeed where rational decisionmaking might not." Pet. App. 72a. Secondly, in the succeeding paragraph, the Court of Appeals enunciates its bottom line as to its view of the failure of the agency properly to act when it forthrightly states that "[b]y rescinding the passive restraint standard without legal justification, NHTSA's arbitrary action presents *a paradigm of ineffective regulation.*" *(Emphasis supplied.)* It continues as follows:

> . . . Notice 25 has wasted administrative and judicial resources, and has possibly delayed without justification a safety standard that may be, "from an economic point of view, as important as any environmental, health, or safety rule now on the books." [Fn.: Comment of William D. Nordhaus, John Musser Professor of Economics at Yale University, May 26, 1981, J.A. 511, 514.] At present rates, 1 in every 60 children born today is expected to die in an automobile accident, and 2 out of every 3 will suffer injuries in a crash. *See* 126 Cong. Rec. S 13,503 (daily ed. Sept. 25, 1980) (Senator Warner). These figures may be low, for NHTSA concedes that the problem at which the passive restraint standard was aimed has become more urgent in recent years. *See* p. 15 *supra*. But the agency concludes Notice 25 by observing:
>
> > After 12 years of rulemaking NHTSA has not yet succeeded in its original intent, the widespread offering of automatic crash protection that will produce substantial benefits.
>
> 46 Fed. Reg. at 53,426. NHTSA may yet conduct the reasoned decisionmaking that can support the rescission of the passive restraint standard, but it may not reject twelve years of preparation for such a standard until it does so. The agency's action here thus represents "an expensive example of ineffective regulation" of the worst kind. [Pet. App. 73a.]

These warnings, however, failed. On July 1, 1982, the agency filed with the Court of Appeals a Notice of Proposed Rule-Making Procedure in "seeking the comments" within 30 days of the publication of the notice "of all interested parties on questions raised by the Court's opinion." The agency would propose after receiving and considering these comments to "issue any supplemental decision . . . within 45 days after the close of the comment period." Pet. App. 133a. The agency specifically proposed to request comments and suggestions on predicted use of automatic restraint systems in general, "on how studies to obtain reliable and statistically significant empirical evidence on usage may be feasibly undertaken in a reasonable period of time and at a reasonable cost," possible study formats involving the equipping of various numbers of private cars, fleet cars, etc. (to select but a few of the areas of information on which the agency proposed to invite comments and suggestions, if allowed to do so by the Court of Appeals). *Ibid.*, 135a. In spite of the admittedly "voluminous record of proceedings on this issue" which would undoubtedly result, the agency proposed that it would only require 75 days of delay to obtain, receive and evaluate the comments. *Idem.*, 133a.

In a word, the agency did not heed the warnings of the Court of Appeals in the June 1, 1982 Opinion of the court! The agency proposed to delay and delay, it proposed to recommence the rule-making or as the phrase goes, to "start all over again."

The remonstrances of the petitioner to the contrary, the Court of Appeals did not have to stand still or sit mute as the agency attempted to thwart its will.

As this Court has well said over four decades ago with language still pertinent to this day, a United States Court of Appeals is a court "with equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, *it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action." (Emphasis supplied.) Ford Motor Company* v. *National Labor Relations Board*, 305

U.S. 364, 373 (1938). *See also Zambrana* v. *Califano*, 651 F.2d 842, 844 (2d Cir. 1981), citing *Igonia* v. *Califano*, 568 F.2d 1383, 1389 (D.C. Cir. 1977), and *Federal Power Commission* v. *Idaho Power Company*, 344 U.S. 17 (1952). Under the instructions of this Court in *Ford*, *supra*, it is clear that the Court of Appeals here acted properly, when its "comment" period had finally closed with a response or rebuttal from the agency, and when it directed the agency to discard the comment period (suggested by the agency) and based on its twelve years of preparation for such a [passive restraint] standard promptly make its response with the submission of "a schedule for resolving the questions raised in . . . [its] opinion, leading either to the rescission or suspension of the standard or to a judicially approved schedule for the effective implementation of that standard or an amended standard." Pet. App. 74a.

## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

*Of Counsel:*
THOMAS C. MCGRATH, JR.
110 South Kenyon Avenue
Margate City, New Jersey 08402
(609) 823-1511

PHILIP R. COLLINS
1026 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 347-8899
*Counsel for Amicus Curiae Automotive Occupant Protection Association*

October 8, 1982

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